**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Restoring Internet Freedom | ) | WC Docket No. 17-108 |

# COMMENTS OF AKAMAI TECHNOLOGIES, INC.


Scott Blake Harris
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Eighth Floor
Washington, D.C. 20036
(202) 730-1300
*Counsel to Akamai Technologies, Inc.*

Lauren M. Van Wazer
Vice President, Global Public Policy

Sanford C. Reback
Senior Director, Global Public Policy

AKAMAI TECHNOLOGIES, INC.
Suite 900
601 Pennsylvania Avenue NW
Washington, D.C. 20004
(703) 581-6472


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## COMMENTS OF AKAMAI TECHNOLOGIES, INC.

Akamai provides a primarily software- and cloud-based suite of content delivery and acceleration technologies that has quietly revolutionized the Internet. Akamai's solutions benefit not just its wide variety of customers and consumers, but also create efficiencies that benefit all participants in the Internet ecosystem.

As a critical component of the Internet ecosystem, Akamai shares the Commission's "commitment to a free and open Internet"[1] that fosters "infrastructure investment, innovation, and options for consumers."[2] The free and open Internet has fueled dynamic growth throughout the Internet ecosystem, including Akamai's services, over the last decade. As a supporter of the decade-old consensus on open Internet principles, Akamai believes the Commission can, and should, maintain open Internet protections, consistent with the Commission's authority, in a form that does not "deter[] the investment and innovation that has allowed the Internet to flourish."[3]

Even under the NPRM's proposed classification of broadband as an information service, the Commission retains authority under section 706 to adopt open Internet protections that do not impose *per se* common carriage obligations. At a minimum, Akamai believes that open Internet

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1 *See Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 ¶ 70 (rel. May 23, 2017) ("NPRM").

2 *Id.* ¶ 5.

3 *Id.* ¶ 71.

principles are key where broadband providers have the greatest incentive to engage in harmful anti-competitive conduct. To ensure effective recourse against such conduct, open Internet protections remain necessary to prevent broadband providers from engaging in traffic practices that disfavor third-party content, service, and CDN providers that compete with the broadband providers' vertically-integrated content, service, or CDN. By targeting open Internet protections on specific anti-competitive harms, the Commission can fulfill its commitment to ensuring a free and open Internet, consistent with its proposed classification of broadband as an information service.

The Commission should also be cognizant that whatever it decides—and even what it says—about open Internet protections will have international implications, since regulators around the world continue to look to the Commission for guidance. This is true with respect to key terms like "prioritization," which are distinct from the CDN services offered by Akamai and other providers. In its use of such key terms, the Commission should remain mindful of the international regulatory implications for companies like Akamai, which—like the Internet—are global in nature, and restate the Commission's long-held view that CDNs do not constitute prioritization.

Akamai looks forward to working with the Commission to ensure a free and open Internet framework that continues to foster both broadband investment as well as the Internet innovation that Akamai has played a key role in developing.

## I. AKAMAI IS A LEADER IN INTERNET INNOVATION

Akamai provides solutions to the many issues that businesses confront on the dynamic landscape of the Internet. Based in Cambridge, Massachusetts, Akamai employs over 7,200 people in seventeen offices in the United States and forty-three international offices located on five continents.

Akamai is a pioneer in the content delivery industry and, while there are many companies that offer content delivery services today, Akamai's extensive distributed architecture remains unique. Whereas typical content delivery companies serve content at (or outside) network peering points—which are often highly congested—Akamai deploys its technologies deep in the networks of last mile broadband Internet providers and caches content locally. Akamai's customers (web sites, web application providers and enterprises) provide content and applications that Akamai distributes across these networks; consumer requests for the particular content or application are processed in the most geographically efficient location. Akamai also uses specialized technologies—such as advanced domain name service mapping, communication protocols, load balancing, and data analysis—to further direct consumer requests for information in the most efficient manner in order to avoid much of the Internet's congested infrastructure. Akamai does all of this using a virtual, rather than a physical, network. Simply put, Akamai allows more content to be delivered faster, more reliably and more securely, while using fewer physical network resources. The result is a better-performing and more cost-effective Internet for everyone.

Not surprisingly, Akamai's content delivery network and products are relied upon by a diverse array of enterprises. Its customers include 60 percent of the Global 500 companies, the top 30 media and entertainment companies, all 20 top global eCommerce sites, 96 of the top 100 online U.S. retailers, 18 of the top 20 world's largest asset managers, all branches of the U.S. military, and 14 out of the 15 U.S. government cabinet-level agencies. At any given time Akamai delivers up to 15-30% of all web traffic, resulting in over three trillion interactions delivered daily.

Akamai's distributed architecture also enhances the security of networks. Akamai both inspects and mitigates attacks closer to the attacker at the edge of the Internet and further away from the content providers' origin servers, and it is capable of providing protections across all

pathways to data centers. By blocking attack traffic originating overseas before it can reach the U.S., Akamai keeps enormous volumes of attack traffic from clogging U.S. networks, thereby benefitting all Internet users in the U.S. whether or not they are accessing content on the Akamai network. Akamai's network also allows visibility into the web traffic of the world's largest and most attacked web properties, yielding valuable insights to help thwart future attacks.

Akamai's intelligent mapping algorithms are another way in which it reduces network congestion. In particular, because Akamai caches content at the network edge, located closer to end users, content often is already on a server close to the end user. When a user requests particular content (*e.g.*, downloads a song or video), Akamai directs that user request to an optimal edge server that is likely close to the user and not overloaded, and the content need not transit and re-transit the entire ISP network with each individual request. Akamai's congestion-management and capacity-enhancement practices benefit not only Akamai's customers, but also other content providers and carriers, who gain in general from networks with reduced congestion and increased capacity.

The bottom line is that Akamai helps carriers and content providers deliver the fast, reliable, and secure Internet experience that today's consumers demand. Simply put, the Internet would not function well without Akamai's services.

## II. CHARTING A COURSE FOR THE INTERNET'S FUTURE

### A. Dynamic Internet Growth for Over a Decade.

In the last fourteen years alone, there has been a six hundred percent increase in the number of global Internet users, from 608 million in 2003, to 3.7 billion in 2017.[4] Internet traffic has

[4] *See Internet Growth Statistics*, INTERNET WORLD STATS (last accessed July 14, 2017), http://www.internetworldstats.com/emarketing.htm.

likewise skyrocketed. Global Internet traffic grew from 784 Petabytes (PB) per month in 2003 to 96,054 PB per month in 2016.[5] Moreover, content is increasingly accessed from smart mobile devices, which were virtually non-existent in 2003. Traffic from mobile websites did not even register as a full percent of overall web traffic in 2003. Global mobile traffic was an estimated 7% of overall traffic in 2016 and is projected to reach 17% of all traffic by 2021.[6] High-speed connectivity in the U.S. has also increased significantly. In 2003, only 16% of all American adults had broadband access at home, compared to 73% in 2016.[7]

This dramatic growth has been reflected in the growth of Akamai's presence, which has helped enable these dramatic ecosystem changes. In 2003, Akamai had 14,733 servers deployed in 71 different countries. Today it has 233,000 servers in 130 countries. Traffic on its network has also grown: there were 1 billion network hits daily in 2003 and *2 trillion content requests daily last year*. Peak traffic in 2003 was 45 Gbps compared to daily Web traffic reaching more than 30 Tbps in 2017. This dramatic upward trajectory is universally expected to continue as consumers demand ever-greater bandwidth while simultaneously seeking fast performance across multiple devices.

### B. Open Internet Protections Are Necessary for Competition and the Continued Growth of the Entire Internet Ecosystem.

Akamai supports the open Internet principles that have led to such dynamic growth throughout the Internet ecosystem. As the Commission's NPRM recognizes, there is a "long

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5 *See Cisco Visual Networking Index: Forecast and Methodology, 2016-2021*, CISCO, 2 (June 6, 2017), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf.

6 *Id*. at 3.

7 *See Home Internet Access*, PEW RESEARCH CENTER (November 6, 2016), http://www.pewresearch.org/data-trend/media-and-technology/internet-penetration/.

standing consensus … that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service."[8] Indeed, open Internet principles have been in place in one form or another at the Commission since its 2005 policy statement endorsing the four Internet freedoms that had previously been articulated by then-Chairman Powell.[9] And the importance of an open Internet has been recognized by stakeholders throughout the Internet ecosystem—ISPs, edge providers, and public interest groups alike.[10] Open Internet principles remain no less important today and Akamai believes that they can—and should—be maintained in a form that does not "deter[] the investment and innovation that has allowed the Internet to flourish."[11]

Akamai supports open Internet protections as a means to ensure that consumers can access the online content and services of their choice and to drive free expression, competition, innovation, and growth on the Internet. As discussed further below,[12] should the Commission adopt the NPRM's proposal to classify broadband as an information service, it would still retain

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8 NPRM ¶ 71.

9 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 ¶ 4 (2005).

10 *See, e.g.*, Brian L. Roberts, *Comcast Statement Supporting a Free and Open Internet*, COMCAST VOICES (April 26, 2017), http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet (Comcast "continue[s] to strongly support a free and Open Internet"); Verizon, *Verizon's Commitment to our Broadband Internet Access Customers* (last accessed July 14, 2017), https://www.verizon.com/about/sites/default/files/Verizon_Broadband_Commitment.pdf (detailing Verizon's "commitment to the Open Internet"); Mark Zuckerberg, FACEBOOK (July 12, 2017), https://www.facebook.com/zuck/posts/10103878724831141; Google, *We stand together*, GOOGLE TAKE ACTION (last accessed July 14, 2017), https://www.google.com/takeaction/action/freeandopen/index.html; Ferras Vinh, *Rules of the Road: Net Neutrality's Bright Line Protections*, CENTER FOR DEMOCRACY AND TECHNOLOGY BLOG (May 11, 2017), https://cdt.org/blog/rules-of-the-road-net-neutralitys-bright-line-protections/; Katy Tasker, *We Stand for a Free and Open Internet: the Declaration of Internet Rights*, PUBLIC KNOWLEDGE BLOG (July 2, 2012), https://www.publicknowledge.org/news-blog/blogs/we-stand-free-and-open-internet-declaration-i.

11 NPRM ¶ 71.

12 *See infra* Section III.

authority under section 706 (and other Title I authority) to adopt open Internet rules in service of the long-held open Internet principles. At a minimum, Akamai believes that open Internet principles are key where broadband providers have the greatest economic incentive to engage in harmful conduct. To that end, open Internet protections remain necessary to prevent ISPs from blocking, throttling, or engaging in other discriminatory traffic management practices against third-party content providers, content distributors, or CDNs that compete with the ISP's vertically-integrated content providers, content distributors, or CDNs. Increasingly, through mergers and otherwise, ISPs own content providers and CDNs.[13] The economic incentive for ISPs to give an advantage to owned or vertically-integrated content providers and CDNs, and their unconstrained ability to do so, is obvious.

Again, there is nothing new about open Internet principles ensuring that anti-competitive practices do not thwart consumers' ability to access and use the content and services of their choosing. Indeed, one of the earliest cases implicating open Internet concerns involved Madison River, a broadband provider that was a subsidiary of a telephone company, which settled a Commission investigation into whether it had blocked Internet ports used for competing VoIP applications.[14] In its *2010 Open Internet Order*, the Commission considered how the vertical integration of a content provider with an ISP could affect the incentives of the ISP to limit its subscribers' access to the content of unaffiliated providers. That order cited the Commission's determination that "CDN providers unaffiliated with broadband providers generally do not

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[13] *See, e.g.*, Press Release, Verizon, *Key Acquisitions Position Verizon Digital Media Services as One-Stop Shop* (Jan. 6, 2014), http://www.verizon.com/about/news/key-acquisitions-position-verizon-digital-media-services-onestop-shop/.

[14] *See Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (EB 2005).

compete with edge providers and thus generally lack economic incentives (or the ability) to discriminate against edge providers"[15] as the rationale for not applying its rules to third-party CDN arrangements. Conversely, the order noted that "delivery networks that are vertically-integrated with content providers . . . have incentives to favor their own affiliated content."[16] The same incentives exist for ISPs to favor vertically-integrated content delivery services.[17]

With no recourse against such practices, third-party content providers and distributors, including third-party CDNs, would be disadvantaged in reaching the customers who access the Internet through the vertically-integrated ISPs. Consumers, in turn, would experience worse performance when trying to reach the content stored on third-party CDNs.

The NPRM recognizes that open Internet protections, and the no throttling rule in particular, have been justified, in part, "to prevent anti-competitive behavior by broadband Internet access providers' seeking to advantage affiliated content," and asks whether such protections are necessary in light of existing antitrust regulatory regimes.[18] Any relief available for such anti-competitive ISP behavior through modern antitrust litigation, however, will almost certainly be too little and too late, particularly in the highly dynamic Internet environment.

Antitrust litigation is, by nature and practice, massively resource and time intensive. Broadband provider practices favoring affiliates are unlikely to manifest in the type of

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[15] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 ¶ 76 n.235 (2010) ("*2010 Order*"). The order found that "the practice of a broadband Internet access service provider prioritizing its own content, applications, or services, or those of its affiliates" would raise "significant concerns" as to unreasonably discriminatory conduct. *Id.* ¶ 76. And it further explained that "[i]f broadband providers had historically favored their own affiliated businesses or those incumbent firms that paid for advantageous access to end users, some innovative edge providers that have today become major Internet businesses might not have been able to survive." *Id.* ¶ 23.

[16] *Id.* at ¶ 23.

[17] *Id.* at ¶ 76.

[18] NPRM ¶¶ 78, 84.

demonstrable price hikes or output effects that are most common predicates to successful antitrust challenges.[19] Thus, the kind of challenge likely to be at issue here is among the most difficult to pursue, requiring significant financial resources, taking years to resolve, and resulting in monetary damages.[20] Providers of third-party services, including start-ups and other small companies, that compete with ISP-affiliates are unlikely to have the resources to pursue such intensive litigation. And, even if they do, in the fast-paced market for Internet content and services, they will have lost significant ground before relief is granted.

Nor would protections against anti-competitive conduct "negatively impact pro-competitive business deals."[21] Nothing would prevent an ISP from acquiring or affiliating with a vertically-integrated content, service provider, or CDN. Rather, the ISP would simply be unable to leverage its position as the underlying provider of broadband service to engage in anti-competitive traffic management practices that distort the market for the owned or affiliated content, service, or CDN.

The bottom line is that protections remain necessary to prevent ISPs from engaging in traffic practices that block, throttle, or otherwise disfavor third-party content providers, content distributors, or CDNs over vertically-integrated content providers, content distributors or CDNs. To this end, Akamai proposes that if the Commission reclassifies broadband Internet access

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19 *See* Hal Singer, *A New Framework for Net Neutrality*, FORBES: #BELTWAY BRIEF (Jan. 10, 2017), https://www.forbes.com/sites/washingtonbytes/2017/01/10/a-new-path-forward-for-net-neutrality/#246984679c23 (explaining that "antitrust may well be the wrong framework" to address such vertically integrated discrimination because of the difficulty in demonstrating "price or output effect[s]").

20 For example, the EU antitrust fine against Intel for its foreclosure of AMD was levied in 2009 for conduct going back to 2002 and remains under review today. Peter Sayer, *Intel's appealing $1.4 billion European antitrust fine over blocking out AMD,* PCWORLD (June 22, 2016), http://www.pcworld.com/article/3086895/hardware/eu-court-has-intel-inside-appealing-14-billion-antitrust-fine.html.

21 NPRM ¶¶ 78, 84.

service as an information service, it should not eliminate protections against blocking and throttling or other discriminatory traffic practices, but rather modify existing rules to target such anti-competitive conduct. In this way, the Commission can achieve end-user protection in line with the *2010 Open Internet Order*, without reaching out to regulate interconnection and inter-network traffic-exchange issues generally.[22] As explained further below, Akamai believes that such targeted rules can be supported under the Commission's section 706 (and other Title I) authority, consistent with the NPRM's proposed classification, and sustainable upon judicial review.

### C. CDN Services Do Not Constitute Prioritization.

In discussing the need for the rule against paid prioritization the NPRM asks a number of questions about content delivery arrangements and how such arrangements should impact its evaluation of whether ISPs "should be allowed to offer an alternative delivery option such [as] paid prioritization."[23] Whatever path the Commission ultimately takes with respect to paid prioritization, it is important that the Commission clearly distinguish between the "prioritization" banned under the 2015 rule and caching services provided by CDNs. As noted above, CDNs cache data near end users and use software and algorithms to identify preferred locations for users to access content in a way that avoids congestion on the Internet. This is localization of content and does not constitute prioritization. It does not involve the management of a network to "favor some traffic over other traffic."[24] Instead, *caching and choosing an optimal server from which to request content reduces congestion for all Internet users by (1) reducing the distance content has to travel*

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[22] This approach is consistent with the NPRM's proposal for the Commission to relinquish any authority over Internet traffic exchange. NPRM ¶ 42.

[23] NPRM ¶ 87.

[24] *See* 47 C.F.R. § 8.9(b).

*to the ender-user and (2) reducing the amount of traffic at congestion points by identifying less congested pathways.* This reduction in congestion benefits both the users requesting the cached content and other users who experience reduced congestion. In other words, the network's transmission of that cached content is not only neutral, but also beneficial for the Internet ecosystem as a whole.

Nor are ISPs that permit CDNs to cache data in their networks engaging in "prioritization." Most, if not all, ISPs allow some content providers and third parties distributing content (such as CDNs) to cache data in their networks. For the same reasons that CDN services do not constitute prioritization, an ISP allowing CDNs (or other content providers) to cache data on servers in its network is not engaging in prioritization.

Making clear the distinction between prioritization and localization remains important no matter what path the Commission takes with respect to paid prioritization because of the international implications of Commission action. Communications regulators around the world have long considered the FCC the "gold standard," and they will carefully review the approach adopted by the Commission. The global reach of Akamai and other technology companies and, indeed, the global reach of the Internet mean that actions taken in the U.S. will have implications across the world for content providers, broadband access providers, and consumers. About two thirds of Akamai's traffic is destined for users outside of the United States. The Commission must, therefore, be mindful of how other governments will view its use of key terms like prioritization, and should expressly restate the Commission's long-held view that CDNs do not constitute prioritization. Clearly distinguishing between CDN services and prioritization will help ensure other countries understand the scope and limits of the U.S. open Internet framework.

## III. LEGAL AUTHORITY FOR ENFORCEABLE OPEN INTERNET PRINCIPLES.

Should the Commission adopt its proposed legal classification of broadband Internet access service as an information service, it would still have legal authority to adopt targeted open Internet protections, like the anticompetitive conduct rules discussed above.[25] To be enforceable by the Commission, non-Title II open Internet principles must be both (1) grounded in an alternative source of legal authority and (2) structured in a way that does not impermissibly impose common carriage obligations on broadband providers. [26]

First, the Commission retains legal authority outside of Title II to address open Internet concerns. Section 706 of the Act provides that the Commission "shall encourage" and, upon a finding that broadband is not being reasonably and timely deployed to all Americans, "shall take immediate action to accelerate" broadband deployment by among other things "removing barriers to infrastructure investment" and "promoting competition in the telecommunications market."[27] Three appellate decisions from two U.S. Courts of Appeals have upheld this provision as an affirmative grant of Commission authority for certain regulations of residential broadband service.[28] And in *Verizon*, the D.C. Circuit specifically held that the concerns animating the Commission's open Internet rules fell within the ambit of that affirmative grant of authority.

The Commission relied on section 706 as a source of legal authority for both its 2010 and 2015 Open Internet rules.[29] While the NPRM asks whether section 706 is better read as merely

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25 *See supra* Section II.B.

26 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

27 47 U.S.C. § 1302(a), (b).

28 *See, e.g.*, *Verizon*, 740 F.3d at 636–42; *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 733–34 (D.C. Cir. 2016).

29 *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶¶ 275-82 (2015) (*2015 Order*).

"hortatory," it neither points to changed circumstances nor articulates any explanation for such a changed interpretation, either as a general matter or—as relevant to this proceeding—consistent with the Commission's "commitment to a free and open Internet." Indeed, throughout the Commission's open Internet proceedings, parties from all corners of the Internet ecosystem have supported the use of section 706 as an affirmative source of Commission authority.[30] As Akamai and many of these parties have previously explained, the Commission can and should use its section 706 authority to protect consumers, advance broadband, and ensure a free and open Internet.[31]

Additional sources of authority also remain available for the Commission to ensure a free and open Internet. With respect to mobile broadband service, for example, the Commission can rely on what the Supreme Court has described as its "expansive powers" to license spectrum under Title III of the Communications Act.[32] In *Cellco v. FCC*, the D.C. Circuit upheld the Commission's authority to adopt data roaming rules for mobile broadband service pursuant to the

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30 *See, e.g.*, Comments of American Cable Association at 47-53 (filed July 17, 2014). Unless otherwise noted, all comments cited herein were filed in GN Docket No. 14-28. *See also, e.g.*, Comments of AT&T at 32 (filed July 17, 2014); Comments of Cox Communications, Inc. at 6-7 (filed July 18, 2014); Comments of Alcatel-Lucent at 13 (filed July 15, 2014); Comments of Consumer Electronics Association at 9 (filed July 17, 2014); Comments of Cisco at 23 (filed July 17, 2014); Comments of Comcast at 13-14 (filed July 15, 2014); Comments of National Cable & Telecommunications Association at 45-47 (filed July 15, 2014); Comments of Pennsylvania Public Utility Commission at 2 (filed July 15, 2014); Comments of Time Warner Cable at 7-8 (filed July 15, 2014); Comments of Wireless Internet Service Providers Association at 38-39 (July 16, 2014). Proponents of a Title II approach also supported the use of section 706 as an affirmative, and complementary, source of legal authority for open Internet rules. *See* Comments of Center for Democracy and Technology at 2 (filed March 26, 2014); Comments of Consumer Federation of America at 66 (filed July 15, 2014); Comments of iClick2Media at 10 (filed July 15, 2014).

31 Of course, as the courts and the Commission have explained, section 706 is not unbounded. *See Verizon*, 740 F.3d at 639-40. It can only support actions under section 706's text that are consistent with the provisions of the Act. *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD Docket No. 98-15, RM 9244, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 ¶ 73 (1998) (finding that section 706 could not trump section 10 forbearance analysis). Here, its use is consistent with the text and bolstered by section 230, which states U.S. policy to maximize user control of Internet and preserve vibrant competition in Internet services.

32 *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

Commission's Title III spectrum licensing authority.[33] So too, the Commission's authority to "[p]rescribe the nature" of licensed services under section 303(b), to "[p]rescribe . . . restrictions and conditions" on licensees in the public interest under section 303(r), and to modify existing licenses to "promote the public interest, convenience, and necessity" under section 316(a) can support open Internet protections.[34] The Commission's 2010 Open Internet Order also pointed to a number of Title II, III, and IV authorities as support for open Internet protections that would further the Commission's statutory responsibilities to promote competition in voice, audio, and video services. These authorities provide additional support particularly for rules that would protect voice, audio, and video service provided over broadband networks in competition with broadband providers' own voice, audio, or video services.[35] Finally, the Commission has additional information collection authority that provides support for the transparency rule.[36]

Second, under *Verizon*, if the Commission reinstates a Title I classification of broadband Internet access service, open Internet protections may not impose *per se* common carriage obligations on broadband providers.[37] In that case, the court struck down the Commission's 2010 no blocking and no unreasonable discrimination rules, finding that they impermissibly imposed

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33 *See Cellco v. FCC*, 700 F.3d 534 (D.C. Cir. 2012) (citing 47 U.S.C.§ 303(b), which authorizes the agency to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;" 47 U.S.C. § 303(r), which empowers the Commission, subject to the demands of the public interest, to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter;" and 47 U.S.C. § 316, which empowers the Commission to modify existing licenses, including by rulemaking, if it determines that such action "will promote the public interest, convenience, and necessity.").

34 47 U.S.C. §§ 303(b), (r), 316(a).

35 *2010 Order* ¶¶ 124-32 (citing sections 201 and 251 for VoIP competition; 303 for radio/TV licensing and competition; and 548 for MVPD competition).

36 *See* 47 U.S.C. § 154(k); 47 U.S.C. § 257.

37 *Verizon*, 740 F.3d at 650 (finding that these rules violated 47 U.S.C. § 153(51), which provides that "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.").

*per se* common carriage on providers of a service the Commission had classified as a non-common carriage information service.[38] As the court explained, absent Title II classification, such open Internet protections must permit providers to "adapt . . . to 'individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.'"[39] The Commission's 2010 open Internet rules were "not so limited," but rather "compelled carriage . . . in all circumstances and with respect to all edge providers."[40] "Significantly," the court noted, the Commission never argued how its 2010 rules "differed from the nondiscrimination rules applied to common carriage generally."[41]

The current bright-line rules against blocking and throttling, which Akamai supported, may not be sustainable under *Verizon* if the Commission adopts the NPRM's proposed information service classification of broadband. Alternately, however, at least some protection against such harmful blocking and throttling could be retained by targeting these rules to specific anti-competitive harms. Such targeted protections would help to foster a free and open Internet without imposing *per se* common carriage obligations on non-common carriers.

The Supreme Court in *Southwestern Cable*, for example, held that requiring cable systems to carry local broadcast signals when the cable operators imported the competing signals of other broadcasters into the local service area did not constitute common carriage, even though the Commission's rule applied to all cable systems. As the Supreme Court later explained in *Midwest Video*, the *Southwestern Cable* holding "was limited to remedying a specific perceived evil [that]

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38 *Id*. at 655-59.

39 *Id*. at 652 (quoting *Cellco*, 700 F.3d at 548).

40 *Id*. at 656.

41 *Id*. (striking down no unreasonable discrimination rule). With respect to the no blocking rule the court likewise found that the Commission had failed to advance an argument that it allowed for individualized negotiation as distinct from the obligations generally applicable to common carriers. *Id.* at 658.

did not amount to a duty to hold out facilities indifferently for public use."[42] In *Verizon*, the D.C. Circuit likewise explained that in *Southwestern Cable* the regulation at issue "imposed no obligation on cable operators to hold their facilities open to the public generally, but only to certain specific broadcasters if and when cable operators acted in ways that might harm those broadcasters."[43] Similarly, the "commercially reasonable" data roaming rule upheld by the D.C. Circuit in *Cellco* as not constituting common carriage *per se*, definitively states that "[c]onduct that unreasonably restrains trade . . . is not commercially reasonable."[44]—thereby imposing an across-the-board restriction on all mobile data providers, while still allowing for sufficient individualized negotiation to avoid common carriage *per se*.

Under these precedents, open Internet protections targeted to address anti-competitive ISP practices that block, throttle, or otherwise discriminate against content or services that compete with the ISP's vertically-integrated content or services would not constitute common carriage *per se*. Unlike the vacated 2010 open Internet rules,[45] such rules would apply only with respect to certain edge provider services and only in certain circumstances—when they compete with a broadband provider's vertically-integrated service—otherwise allowing broadband providers to engage in individualized negotiations.

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42 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 n.16 (1979).

43 *Verizon*, 740 F.3d at 656.

44 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411 ¶ 45 (2011).

45 For mobile providers, the 2010 no blocking rule was limited, in part, with respect to applications that competed with a mobile provider's voice or video telephony services. *2010 Order* ¶ 99. Neither the FCC's briefs, nor the *Verizon* court's analysis focused on this aspect of mobile no blocking rule, perhaps because the rule still prohibited blocking of all websites. In any event, the argument that the targeting of this aspect of the rule made it different from general common carriage was not made by the FCC and, thus, not before the court.

## CONCLUSION

For over a decade, the free and open Internet has fostered dynamic growth and innovation throughout the Internet ecosystem, including Akamai's services. For that to continue, consumers must be able to access the Internet content of their choosing, free of anti-competitive and discriminatory broadband practices. To that end, the Commission can—and should—retain enforceable open Internet protections against such practices and has the legal authority to do so.

Respectfully submitted,

/s/ Lauren M. Van Wazer

Scott Blake Harris
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Eighth Floor
Washington, D.C. 20036
(202) 730-1300
*Counsel to Akamai Technologies, Inc.*

Lauren M. Van Wazer
Vice President, Global Public Policy

Sanford C. Reback
Senior Director, Global Public Policy

AKAMAI TECHNOLOGIES, INC.
Suite 900
601 Pennsylvania Avenue NW
Washington, D.C. 20004
(703) 581-6472

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